

Supreme Court Seeks Solicitor General's Views on Apple v. Pepper Petition

By Reid Wells, J.D. Candidate 2020 | October 26, 2017

The Supreme Court has asked the U.S. Solicitor General [Noel Francisco](#) to file a brief expressing the federal government's views on Apple's petition for review of *Apple v. Pepper*. This is good news for the electronics giant as the Court is traditionally more likely to grant *certiorari* after calling for the Solicitor General's opinion.

In 2011 a group of consumers, seeking class action status, filed a lawsuit alleging that Apple monopolizes the market for iPhone apps in order to charge [excessive commissions](#) (currently at 30%). In January, the Ninth Circuit ruled that the consumers were allowed to pursue these allegations, in direct contrast with a long-held Supreme Court doctrine established in *Illinois Brick Co. v. Illinois*.

If the Supreme Court upholds the Ninth's Circuit decision it would leave Apple liable to lawsuits from developers and consumers alike. The Court's decision in [Illinois Brick](#) attempted to avoid this very floodgate problem by holding that only direct purchasers of a good or service may file a private lawsuit under the Sherman Act. Non-direct purchasers do not have standing in antitrust disputes even if they demonstrate that they suffered economic harm from anticompetitive conduct.

The Ninth Circuit's decision not only exposes Apple to claims from many parties but creates confusion on how to enforce the Court's decision in *Illinois Brick*. In 1998 the Eighth Circuit used *Illinois Brick* to find that consumers couldn't go after electronic distributors with [monopolization accusations](#). The Washington Legal Foundation has filed an [amicus brief](#) supporting Apple's petition for *certiorari*, asking the Court to create uniformity on this antitrust question.

Apple's defense relies on a claim that consumers are not direct purchasers from the App Store and therefore do not qualify to bring a suit under the Sherman Act. The app developers pay commission to Apple and set the price for their app's sale. Apple claims to [facilitate the sale](#) of the product while retaining no ownership of the app. The Ninth Circuit disregarded this argument, holding that Apple acts as a distributor and not as a mere collector of payments that ultimately end up in the developer's pockets.

While seeking the views of the federal government might indicate the Court's interest in reviewing Apple's petition, it marks a departure from the Court's reluctance in hearing antitrust cases in recent history. This is a doubly interesting decision on the Court's part as the Court typically calls on the Solicitor General only when questions of review implicate significant federal interests. Here, the Court's decision to review Apple's petition ultimately has no effect on the government's ability to enforce the Sherman Act.